Office-Supreme Court, U.S.
FILED
DEC 7 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 664

WESTERN FRUIT GROWERS SALES CO.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR CERTIORARI.

JAMES M. DALE,
9944 Santa Monica Boulevard,
Beverly Hills, California,
Attorney for Petitioner Western Fruit Growers Sales Co.

SUBJECT INDEX

Page

Opinions delivered in the United States Court of Appeals for the Ninth Circuit and by the Federal Trade Commission 1

Jurisdictional statement 1

Questions presented for review 2

Statutes involved 2

Statement of the Case 5

1. Procedural matters 5

2. Summary of the facts 7

Argument 10

I.

A seller cannot be found to have violated Section 2(c) by virtue of brokerage payments to Seller's broker in the absence of knowledge on Seller's part that the broker was actually purchasing for his own account, rather than representing Seller 10

II.

In determining whether transactions between Petitioner and its brokers were sales the commission could not properly disregard and refuse to consider whether Petitioner or its brokers intended the transactions to be sales 16

III.

The Commission cannot, in view of the new provisions for enforcement of cease and desist orders under Section 2(c), issue a broad, general order and place upon the Petitioner the burden of interpreting the order at its peril 18

Conclusion 24

INDEX TO APPENDICES

Page

Appendix "A". Opinion of the United States Court of Appeals for the Ninth Circuit 1

Appendix "B". Decision and order 7

Appendix "C". Initial decision 9

TABLE OF AUTHORITIES CITED

Case	Page
Adams v. Herman, 106 Cal. App. 2d 514, 235 P. 2d 227	16
Alison v. Whitcomb, 289 Mich. 80, 286 N. W. 165	16
Biddle Purchasing Co. v. F.T.C., 96 F. 2d 687	10, 15
Boden v. Harter, 240 Ky. 138, 41 S. W. 2d 920	16
Borlund v. Nevada Bank, 99 Cal. 89, 33 Pac. 737	16
City and County of San Francisco v. United States, 106 F. 2d 569	16
Eidson Produce Co., F. T. C. Docket No. 8064 (1961)	11, 15, 23
F.T.C. v. Henry Broch & Co., 363 U. S. 166	11, 12, 15, 23
F.T.C. v. Henry Broch & Co., 368 U. S. 360	19, 20, 21, 23
F.T.C. v. Morton Salt Co., 344 U. S. 37	21
F.T.C. v. Washington Fish & Oyster Co., 271 F. 2d 39	23
Florida Citrus Exchange, 53 F. T. C. 493	17
Hruby Distributing Co., F. T. C. Docket No. 8068 (1962)	23
Oliver Brothers, Inc. v. F.T.C., 102 F. 2d 763	10
Pettaway v. Commercial Automotive Service, 49 Wash. 2d 650, 306 P. 2d 219	16
Southgate Brokerage Co. v. F.T.C., 150 F. 2d 607	14
Swanee Paper Corp. v. F.T.C., 291 F. 2d 833	21

Miscellaneous

105 Congressional Record 12734, 12735 (1959) 21
House Report No. 580, June 26, 1959, 86th Congress, 1st Sess. 19
H. R. Rep. No. 580, 86th Cong., 1st Sess. 6 (1959) .. 21
Senate Report No. 83, 86th Cong., 1st Sess. 3 (1959) 21

Statutes

Act of July 23, 1959, Public Law 86-107, Sec. 1(c), 73 Stat. 243 ..... 3, 19
Act of July 23, 1959, Public Law 86-107, Sec. 1(c), 73 Stat. 244 4
Act of July 23, 1959, Public Law 86-107, Sec. 1(c), 73 Stat. 245 5
Clayton Act, Sec. 2(c) 2, 6, 9, 10, 11, 13, 15, 17, 18, 22, 23
Clayton Act, Sec. 11 ..... 2, 3, 19
Clayton Act, Sec. 11(c) 2, 3, 20
Clayton Act, Sec. 11(l) 5, 22
Clayton Act, New Sec. 11(g) 19
Clayton Act, New Sec. 11(l) 20
Robinson-Patman Act Sec. 2(c) 2, 12, 15
United States Code, Title 15, Sec. 13(c) 2, 5
United States Code, Title 15, Sec. 21(c) 2, 3
United States Code, Title 15, Sec. 21(g) 4
United States Code, Title 15, Sec. 21(l) 5

IN THE

Supreme Court of the United States

October Term, 1963

No. .....

WESTERN FRUIT GROWERS SALES CO.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR CERTIORARI.

Opinions Delivered in the United States Court of Appeals for the Ninth Circuit and by the Federal Trade Commission.

The opinion of the United States Court of Appeals for the Ninth Circuit is appended hereto as Appendix A. The opinion is reported at 322 F 2d 67 (9th Cir. 1963).

The decision and order of the Federal Trade Commission is appended hereto as Appendix B. The initial decision, to which reference is made in the Federal Trade Commission's decision and order, is appended hereto as Appendix C.

Jurisdictional Statement.

The decree of the United States Court of Appeals for the Ninth Circuit, review of which is sought in this Court, is undated and was filed on September 12,

1963. An order denying a petition for rehearing was dated September 26, 1963, and filed and entered on September 27, 1963.

Jurisdiction of this Court rests upon Section 11(c) of the Clayton Act, 15 U. S. C. Section 21(c).

Questions Presented for Review.

I.

Whether the Federal Trade Commission, in determining whether transactions between Petitioner and Petitioner's brokers constituted sales, could properly refuse to consider and hold immaterial, evidence that Petitioner and Petitioner's brokers did not *intend* the transactions to be sales.

II.

Whether Petitioner may be found to have violated Section 2(c) of the Robinson-Patman Act without evidence or a finding that Petitioner had knowledge of the facts alleged to constitute the violation.

III.

Whether the Federal Trade Commission may, despite the new enforcement procedures provided by Section 11 of the Clayton Act, simply issue its order in the terms of Section 2(c) of the Robinson-Patman Act without in any way tailoring the order to the facts found and without providing any guidance to Petitioner in its effort to comply with the order.

Statutes Involved.

1. Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, as it appears at 15 U. S. C. Section 13(c) provides as follows:

"(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to

pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

2. Section 11(c) of the Clayton Act, as it appears at 15 U. S. C. Section 21(c) provides in pertinent part:

"Any person required by such order of the Commission . . . to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States. . . . Upon filing of the petition the court shall have . . . power to make and enter a decree affirming, modifying, or setting aside the order of the commission. . . . *To the extent that the order of the commission . . . is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission* . . . ." (emphasis supplied).

3. Prior to the amendment of Section 11 of the Clayton Act by The Act of July 23, 1959, Public Law 86-107, See. 1(c), 73 Stat. 243, the relevant provisions of the statutory predecessor to Section 11(c) set forth above provided, in pertinent part:

"Any party required by such order of the Commission . . . to cease and desist from a viola-

tion charged may obtain a review of such order in said United States Court of Appeals. . . . Upon the filing of such petition the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission . . . as in the case of an application by the Commission . . . for the enforcement of its order. . . ."

4. Section 11(g) of the Clayton Act, added by The Act of July 23, 1959, Public Law 86-107, Sec. 1(c), 73 Stat. 244, as it appears at 15 U. S. C. Section 21(g) provides:

"(g) Any order issued under subsection (b) of this section shall become final—

1. upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section; or

2. upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed;

3. upon the denial of a petition for certiorari, if the order of the commission or board has been affirmed or the petition for review has been dismissed by the court of appeals; or

4. upon the expiration of thirty days from the date of issuance of the mandate of the Su-

preme Court, if such Court directs that the order of the commission or board be affirmed or the petition for review be dismissed."

5. Section 11(1) of the Clayton Act, added by the Act of July 23, 1959, Public Law 86-107, Sec. 1(c), 73 Stat. 245, as it appears at 15 U. S. C. Section 21(1) provides:

"(1) Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

Statement of the Case.

This is a proceeding brought by the Federal Trade Commission under the brokerage provisions of the Robinson-Patman Act, 15 U. S. C. Section 13(c) [R. p. 2].

1. Procedural Matters.

The Federal Trade Commission issued its complaint charging Western Fruit Growers Sales Co. with paying, granting or allowing to certain buyers and brokers purchasing for their own account, brokerage or allowances in lieu thereof [R. pp. 2, 3].

Petitioner's Answer denied the charges set forth in the complaint [R. pp. 8, 9].

At the conclusion of the initial hearing the examiner found that Petitioner's *brokers* had, on a few occasions, sold fruit previously invoiced in the broker's name to purchasers at a price different from the original invoice price [R. pp. 59, 60]. The examiner did *not* find that Petitioner *knew* of the broker's alteration of sales prices [R. pp. 55-61] and expressly declined to determine whether the transactions between Petitioner and its brokers were *intended* to be sales to the brokers [R. pp. 59, 60] Appendix C, p. 18. Based upon the brokers' actions, and without inquiring into the reasons for the brokers' alteration of sales prices, the hearing examiner concluded that Petitioner had violated Section 2(c) [R. p. 60].

The hearing examiner further found that volume discounts given to chain stores by Petitioner constituted discounts in lieu of brokerage [R. p. 61], despite an entire absence of evidence of any relationship between brokerage and the volume discounts [Rep. Tr. pp. 1-135]. This finding was later stricken by the Commission but the hearing examiner's order was in no way altered to accommodate the change in findings.

The order was made in the terms of the statute and was not in any way tailored to the facts found by the examiner [R. pp. 61, 62].

2. Summary of the Facts.

Petitioner was engaged, at all relevant times, in the sale of fresh fruit in the United States and Canada [Rep. Tr. p. 18, lines 15-24]. In accomplishing such sales, Petitioner normally either sold directly to the customer or utilized the services of a broker in obtaining sales [Rep. Tr. p. 18, lines 20-23]. Approximately one-hundred independant brokers were used by Petitioner in order that customers throughout the nation could be served [Rep. Tr. p. 65, line 25, to p. 66, line 2].

With respect to most sales, particularly those involving full carload lots of fruit, Petitioner directly billed its customer, whether or not a broker had obtained the sale [Rep. Tr. p. 27, lines 8-13]. In a few sales, particularly those in which several small customers were each to receive portions of a single carload of fruit rather than full carloads, the broker was billed [Rep. Tr. p. 27, lines 1-17; p. 82, lines 9-21; p. 88, line 9, to p. 89, line 23]. The convenience of making one invoice to the broker for a carload of fruit, rather than five or six invoices to all of the small purchasers of portions of the carload [Rep. Tr. p. 82, lines 14-21; p. 88, line 9, to p. 89, line 23; p. 90, lines 8-23] and the very considerable overhead savings realized, necessitated the practice of billing the broker [Rep. Tr. p. 82, line 24, to p. 91, line 8]. Such savings were particularly important in view of the very small margin of profit upon which Petitioner operated [Rep. Tr. p. 83, line 4, to p. 84, line 6].

When billings were made in the broker's name rather than in the name of Petitioner's customers, the broker in turn invoiced each customer directly, collected the price from each customer, and remitted to Petitioner [Rep. Tr. p. 25, lines 10-13; p. 27, lines 1-16; p. 88, lines 9-12; p. 82, line 14, to p. 83, line 3].

In a few instances, as Petitioner learned for the first time at the initial hearing, Petitioner's brokers invoiced Petitioner's customers at a price in excess of that billed to the broker by Petitioner [Rep. Tr. p. 103, line 5, to p. 105, line 5]. On one occasion, unknown to Petitioner until the initial hearing, the broker invoiced a customer at a price slightly less than that designated by Petitioner [Rep. Tr. p. 107, line 16, to p. 108, line 10]. The government made no attempt to obtain testimony concerning these differences in price. Petitioner's brokers may have taken a secret profit in violation of their fiduciary duty to account for all proceeds to Petitioner. On the other hand the differences in total invoice price, which did not amount to more than a few dollars in any instance [Rep. Tr. p. 102, line 15, to p. 108, line 7] may have been occasioned by invoicing errors on the part of the brokers. Or legitimate promotional or other services may have been rendered by the brokers to Petitioner's customers, thus entitling the brokers to compensation that may have been reflected in the brokers' records as an increase in price. The true reason for the price difference does not appear in the record since the government and the

examiner took the position that introduction of invoices by Petitioner at one price and payment of brokerage on the sale, coupled with brokers' invoices to Petitioner's customers at a different rate, conclusively established a violation of Section 2(c) by Petitioner [R. p. 60].

Petitioner's policy and practice was that brokerage would not be paid to a broker in any instance in which the broker was purchasing fruit for his own account [Rep. Tr. p. 75, line 10, to p. 78, line 22]. Petitioner's brokers were informed of this policy directly by Petitioner's sales manager [Rep. Tr. p. 75, line 10, to p. 78, line 22].

Undisputed evidence established the fact, expressly ignored by the examiner [R. pp. 59, 60], that Petitioner did not *intend* the transactions relied upon by the Commission to be sales to the Petitioner's brokers [Rep. Tr. p. 75, line 10, to p. 78, line 22]. Nor did Petitioner have knowledge that on a few occasions its brokers in distant cities charged Petitioner's customers different prices than those billed by Petitioner [Rep. Tr. p. 103, lines 5-14; p. 108, lines 13-24; p. 112, lines 12-20].

ARGUMENT.

I.

A Seller Cannot Be Found to Have Violated Section 2(c) by Virtue of Brokerage Payments to Seller's Broker in the Absence of Knowledge on Seller's Part That the Broker Was Actually Purchasing for His Own Account, Rather Than Representing Seller.

Knowledge of the operative facts has long been tacitly accepted as a requirement for a finding of violation of Section 2(c). In *Biddle Purchasing Co. v. F.T.C.*, 96 F. 2d 687 (2d Cir. 1938) the Court stressed the fact that

> "(s)ellers . . . violated Section 2(c) of the Robinson-Patman Act by paying brokerage fees to Petitioner, Biddle Company, *with knowledge* of the fact that the fees were intended to be . . . paid over by said Biddle Company to its buyers. . . ." (emphasis supplied).

In *Oliver Brothers, Inc. v. F.T.C.*, 102 F. 2d 763 (4th Cir. 1939) the Court, in its findings, twice referred to the intentional character of Petitioner's acts in the following terms.

> "There is not, in fact, any payment of brokerage commissions made by any of the respondent sellers to . . . Oliver Brothers, Inc. which is not *intended* for the buyer and which does not reach the buyer. Such brokerage commissions, being *intended* for the buyers, are not in fact paid in satisfaction of any . . . indebtedness due from the seller to respondent Oliver Brothers, Inc. . . ." (emphasis supplied).

The Supreme Court, in *F.T.C. v. Henry Broch & Co.*, 363 U. S. 166, 174 (1960), suggested that had the *seller* been unaware of the operative facts, this lack of knowledge would have been considered in determining whether the seller had violated the section. That the Federal Trade Commission may now have accepted the requirement of knowledge is indicated by its striking from the initial decision, in *Eidson Produce Co.*, F.T.C. Docket No. 8064, the hearing examiner's finding that proof of knowledge was not required in a 2(c) case and substituting therefor the finding that respondent had knowledge of the operative facts.

The patent unfairness and severe hardship that would be entailed if knowledge were not requisite to a finding that a seller had violated Section 2(c) is best realized in the factual framework of the present case. Petitioner's brokers are located in cities throughout the nation. Petitioner has over one hundred brokers of whom three have been shown to have, without Petitioner's knowledge, invoiced Petitioner's customers at a price that was higher or lower than the price designated for the sale by Petitioner. Yet respondent's brokers remitted the full invoice price to Petitioner and in no way advised Petitioner that anything irregular had taken place. Petitioner had advised its brokers that brokerage would not be paid in any instance in which a broker purchased fruit for his own account. Short of actually touring the nation and auditing the books of all of Petitioner's brokers, checking directly with the customers as to the price shown on the customer's invoices, and requiring the brokers to explain any differences in price, Petitioner could not assure itself that none of its brokers were taking a brokerage payment in violation of Sec-

tion 2(c) of the Robinson-Patman Act. The alternative of Petitioner's directly billing each customer, even when five or six small purchasers each receive a portion of a railway car, would be ruinous in view of the small margin of profit realized by Petitioner. The effect of a requirement that Petitioner bill all of its customers directly rather than rely on the honesty and reputation of its brokers would be that Petitioner could no longer sell to small lot purchasers and would be compelled to deal exclusively with chain stores. Such a result would be ironic in view of the fact that the Robinson-Patman Act was passed for the primary purpose of preventing chain stores from obtaining competitive advantages over small purchasers. See *F.T.C. v. Henry Broch & Co.*, 363 U. S. 166, 168-169 (1960).

The hearing examiner's findings concerning the portion of this case dealing with transactions between Petitioner and three of Petitioner's brokers are set forth at this point in order to illustrate that the acts relied upon by the Commission were acts of the brokers, unknown to Petitioner.

> "The evidence here clearly establishes that these *brokers* were in fact acting for themselves and selling to others at a profit to themselves (or, in only the one instance above referred to at a loss). *There* acts were inconsistent with the claim that they were Respondent's brokers. When *they* collected from their buyers they remitted, at most, only what they, *the brokers*, were billed for by Respondent, and Respondent never indicated any interest in a further accounting from the *brokers*, who *took* both a brokerage from Respondent and either a brokerage or a profit in such cases from

those to whom they sold. Whether *they* be considered as buyers selling for themselves or as brokers for their buyers, in either event the *Respondent* has violated Section 2(c). 'A seller may not pay the broker brokerage on the latter's purchases for his own account.' *Southgate Brokerage Co. v. F.T.C.* (C.C.A. 4, 1945), 150 F. 2d 607. Nor may a broker for a retail buyer receive commissions from the seller. (Citations omitted)."

It is significant that all of the acts referred to by the examiner are acts of the brokers. The *brokers'* acts are stated to be inconsistent with the contention that the brokers acted in a representative capacity; the *brokers* are found to have taken an improper brokerage from Respondent; and the *brokers* failed to account to Petitioner for more than the price originally invoiced by Petitioner. After reviewing all of the acts of the brokers, however, the Commission concluded without any evidence or finding that these acts were imputable to Petitioner, that *Petitioner* had violated Section 2(c).

The record is entirely devoid of any evidence that Petitioner participated in, consented to, or was even aware of the fact that Petitioner's brokers' invoicings to buyers differed, in some instances, from the prices at which Petitioner, for convenience and for cost savings, billed the broker [Rep. Tr. pp. 1-135]. Further, the government did not present evidence indicating that the brokers' invoicing changes were in any way improper or inconsistent with title remaining in seller. The government apparently simply assumed, without legal precedent, that the fact that changes in invoicing had been made by the broker automatically converted

the transaction between seller and his broker from a brokerage transaction into a sale *ab initio*.

The facts of the *Southgate Brokerage* case, relied upon by the hearing examiner and cited in the findings of fact, go far beyond a mere price change in broker invoicing. In the *Southgate Brokerage* case the government established that the broker therein involved had stored the merchandise in its own warehouse, insured the merchandise in its own name and at its own expense, paid all taxes levied on the merchandise, assumed all risk of loss by virtue of damage in transit, entered into contracts with others to deliver merchandise in the future at fixed prices, and in every respect, acted as an owner of the merchandise. In contrast, the only fact found in the present case to support the Commission's contention that the transactions constituted sales was the fact that the broker sometimes reinvoiced at a new price. The brokers' unilateral act in reinvoicing at a different price without Petitioner's knowledge cannot, without more, reasonably be held to convert the transaction between Petitioner and his broker into a sale and render Petitioner guilty of paying a brokerage to a buyer.

Whether three of Petitioner's brokers in distant cities were taking a secret profit in violation of their fiduciary duty to Petitioner or whether the difference in reinvoicing by these brokers was occasioned by small bookkeeping errors, or the taking, by the brokers, of legitimate charges for services rendered does not appear from the record.

It is submitted that if Petitioner's brokers have taken improper brokerage payments without the knowledge, concurrence or intent of Petitioner, then the appropriate action to have been taken would have been against the particular offending brokers. To find that the fact that three of Petitioner's brokers had *taken* improper brokerage payments, if in fact they had, automatically placed Petitioner in violation of the statute, despite Petitioner's lack of knowledge and its inability to prevent such conduct, was manifestly unjust.

Whether knowledge of his brokers' acts consistent with the taking of both title to the goods and a brokerage commission is necessary to a finding that a *seller* has violated Section 2(c) of the Robinson-Patman Act is currently the most debated question concerning interpretation of the statute.

The Commission, in avoiding the issue of knowledge by altering the findings in the *Eidson* case, *supra*, added fuel to the flame that had been smoldering since this Court's suggestion, in the *Biddle Purchasing Co.* case, *supra*, that knowledge might be requisite to a finding that a seller had violated Section 2(c). This Court's recent suggestion, in *F.T.C. v. Henry Broch & Co.*, 363 U. S. 166, 174 (1960) that the knowledge and intent of the person charged with violating Section 2(c) is material to a determination of that person's guilt, further stresses the importance of a resolution, by this Court, of the controversy concerning the knowledge question.

II.

In Determining Whether Transactions Between Petitioner and Its Brokers Were Sales the Commission Could Not Properly Disregard and Refuse to Consider Whether Petitioner or Its Brokers Intended the Transactions to Be Sales.

One of the elements universally recognized as essential to a sale is the intention of the parties thereto that a sale, as distinguished from any other transaction or relationship, shall result. *E.g., Boden v. Harter*, 240 Ky. 138, 41 S. W. 2d 920; *Alison v. Whitcomb*, 289 Mich. 80, 286 N. W. 165, 167; *Borlund v. Nevada Bank*, 99 Cal. 89, 33 Pac. 737; *Adams v. Herman*, 106 Cal. App. 2d 514, 235 P. 2d 227; *Pettaway v. Commercial Automotive Service*, 49 Wash. 2d 650, 306 P. 2d 219 (1957).

In *City and County of San Francisco v. United States*, 106 F. 2d 569 (9th Cir. 1939), *rev'd on other grounds*, the Court of Appeals for the Ninth Circuit held that the intention of the parties to create an agency relationship, rather than to transact a sale, *must* be considered by the court.

Yet in the present case the hearing examiner found [R. pp. 59-60: Appendix C. p. 18] that:

> "The testimony of Frees . . . . indicates that it was the understanding between Respondent and its several brokers that these direct broker billings were not considered sales between them, but were made in order to avoid the additional costs above referred to. *It is unnecessary to determine here whether this position taken by Respondent and its brokers was true or false.* In *Modern Marketing Service, Inc. v. F.T.C.*, C.C.A. 7 (1945), 149 F.

2d 970, it was held that motive and good faith were immaterial to a violation of Section 2(c). . . ." (Emphasis added).

In finding that evidence of the absence of the intent necessary to constitute a sale was immaterial to the determination of this case, the Federal Trade Commission confused such intent with intent to violate the statute. The hearing examiner's reference to the statute as a *malum prohibitum* statute and his statement that "mental conditions and reasons are insufficient to avoid the statute's mandate" [R. 60, Appendix C, p. 18] further highlight the hearing examiner's failure to distinguish between the intent factually necessary for a sale to exist and "good intentions" on the part of one accused of violating Section 2(c).

Whether in fact there were sales to Petitioner's brokers is the basic question in this case it was in *Florida Citrus Exchange*, 53 F. T. C. 403, 505 (1956). Yet, in the present case the Commission adopted a special finding that intent, a fundamental prerequisite to a sale, was immaterial and would be disregarded. Neither the *Florida Citrus Exchange* case nor any of the cases dealing with purported violations of Section 2(c) presents such a startling proposition.

After specifically refusing to determine whether intention to sell actually existed with respect to the transactions between Petitioner and its brokers the Commission could not properly find that the transactions constituted sales. Consequently, the general finding that Petitioner paid brokerage to its brokers on fruit *sold* to the brokers must fall.

With respect to intention of the parties, the Circuit Court stated that,

> "Mr. Frees, Petitioner's general manager and the only witness to testify, did state that the transactions were not intended by the parties to be sales, but the credibility of his testimony was a matter for the determination of the hearing officer." (Appendix A, n. 5).

While the Circuit Court's statement of the law is correct, it fails to recognize that the hearing examiner expressly refused to determine the credibility of the witness and instead specifically found that testimony concerning intent to make a sale was immaterial in a Section 2(c) proceeding (R. 60, 61; Appendix C, p. 18).

It is submitted that the Commission's failure to consider relevant and vital evidence and its failure to determine a basic issue in this case constitute a flagrant departure from the usual course of judicial proceedings. It is further submitted that the Circuit Court's sanction of the Commission's omission calls for an exercise of this Court's power of supervision.

III.

The Commission Cannot, in View of the New Provisions for Enforcement of Cease and Desist Orders Under Section 2(c), Issue a Broad General Order and Place Upon the Petitioner the Burden of Interpreting the Order at Its Peril.

Prior to the 1959 amendment to the Clayton Act, three steps were required before effective legal penalties could be assessed. First the Commission issued its cease and desist order. If Respondent did not petition for review this original cease and desist order never became

final. House Judiciary Committee Report: House Report No. 580, June 26, 1959, 86th Congress, 1st Sess. If Respondent did appeal, the Court of Appeals had the power but not the duty to judicially adopt and enforce the order. See Section 11 of the Clayton Act prior to its amendment by the Act of July 23, 1959, Public Law 86-107, Sec. 1(c), 73 Stat. 243.

The second step toward enforcement of a pre-amendment order was a proceeding by the Commission to establish that Respondent had violated the Commission's original cease and desist order. House Judiciary Committee Report; House Report No. 580, June 26, 1959, 86th Cong. 1st Sess. If this new violation were established, the Court could then tailor the Commissioner's order, ". . . . in the setting of a specific asserted violation, so as to meet the legitimate needs of the case." *F.T.C. v. Henry Broch & Co.*, 368 U. S. 360 (1962).

If respondent, after the Circuit Court had tailored and adopted the order, again committed the same unlawful practice, he was subject to punishment for contempt. No civil penalties were available to the government as an enforcement method.

The 1959 amendments to Section 11 of the Clayton Act made the following significant changes in enforcement procedure:

(1) Orders of the Commission became final without a second hearing (New Section 11(g) of the Clayton Act);

(2) If respondent petitions for review and the Court of Appeals affirms the Commission's order, the Court must issue its own order commanding obedience to the

terms of the order of the Commission (Section 11(c) of the Clayton Act);

(3) Civil penalties in the amount of up to $5,000.00 per day are provided in the event of violation of a final order (New Section 11(1) of the Clayton Act).

The Supreme Court, in considering a pre-amendment cease and desist order stated:

> "We do not wish to be understood, however, as holding that the *generalized language of paragraph (2)* would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violation of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application" (emphasis added). *F.T.C. v. Henry Broch & Co.*, 368 U. S. 360, 366-368 (1962).

The "generalized language" questioned by the Supreme Court in the 1962 *Broch* case is the exact language used by the Commission in its order against Petitioner.

The Supreme Court stressed, in the 1962 *Broch* case, that prior to the new amendments the Commission and the Court had an opportunity before penalties were imposed, to

> ". . . construe the order as designed strictly to cope with the threat of future violations identical with or like or related to the violations which Broch was found to have committed, or as forbidding no activities except those which if continued

would directly aid in perpetrating the same old unlawful practices.' " 308 U. S. 306-307.

In *Swanee Paper Corp. v. F.T.C.*, 291 F. 2d 833 (2d Cir. 1961) the Court recognized that the 1959 amendments require the Commission to abandon its practice of issuing broad orders in the terms of the statute. For a criticism of such practices made even prior to the 1959 amendments see *F.T.C. v. Morton Salt Co.*, 344 U. S. 37 (1948).

That Congress, as well as the Courts, was dissatisfied with the scope of Commission orders prior to the 1959 amendments and expected the Commission to tailor its orders thereafter was clearly and forcefully expressed by members of Congress at the time of the amendment. *E.g.* S. Rep. No. 83, 86th Cong., 1st Sess. 3 (1959); H. R. Rep. No. 580, 86th Cong., 1st Sess. 6 (1959); 105 Cong. Rec. 12734, 12735 (1959).

The extraordinary breadth of the order issued by the Commission in the 1962 *Broch* case and in the present case was best demonstrated, in the instant case, by the Commission's apparent assumption that it could drop an entire class of violations found by the hearing examiner and yet retain the same all-purpose order. The Commission conceded, before the Circuit Court (Appendix A, n. 3), that it intended to and had stricken all of the hearing examiner's findings concerning volume discounts from its decision. It is apparent that granting volume discounts in lieu of brokerage upon purchases of 50 or more carloads of fruit by a few large chain stores is not similar or related to the practice of paying brokerage on small lot shipments to Petitioner's brokers. Yet the Commission, discovering that the hearing examiner had erred in finding discriminatory volume dis-

counts, did not find it necessary to alter its "utility" order by so much as one word to tailor the order to its new findings. The catholicity of the Commission's standard Section 2(c) order is, without question, administratively convenient. The Commission, in seeking sanctions against a person previously found to have violated Section 2(c) as a seller, need not even review the order previously entered since it is simply a restatement of the statute itself in every way that it could possibly refer to a seller of goods.

Petitioner's primary contention, of course, is that under the evidence and findings no order can appropriately be made against Petitioner. If, however, such an order were made it should be limited to the actual acts found to have been committed by Petitioner and closely related acts. It is conceded that fashioning such an order might prove an arduous task. It is a task, however, that the Commission should undertake, if any order is to be entered The alternative is to place upon Petitioner the burden of interpreting the statute at its peril. The hazards of the fruit industry are already considerable. In addition to these hazards, under the present order, Petitioner is burdened with the constant choice of either risking extinction at the hands of the Commission by virtue of misinterpreting Section 2(c) and calling down upon itself the severe penalties provided by Section 11(1) of the Clayton Act or, on the other hand, risking economic death at the hands of Petitioner's competitors by foregoing practices which Pe-

titioner now knows to be lawful but fears might at some future time be held to be a violation of the section. It cannot be seriously contended that the Courts or the Commission, at the present time, have fully explored the meaning of Section 2(c) and defined what is or is not a violation of that Section. An examination of recent cases makes it plain that new interpretations of Section 2(c) and its scope, as well as reversals of lower Court holdings and divided opinions in court and Commission decisions, are appearing more, rather than less frequently. *E.g., Henry Broch & Co. v. F.T.C.*, 368 U. S. 360 (1962); *F.T.C. v. Henry Broch & Co.*, 363 U. S. 166 (1960); 291 F. 2d 833 (2d Cir. 1961); *F.T.C. v. Washington Fish & Oyster Co.*, 271 F. 2d 39 (1959); *Hruby Distributing Co.*, F.T.C. Docket No. 8068 (1962); *Eidson Produce Co.*, F.T.C. Docket No. 8064 (1961).

It is submitted that this Court's clarification of the permissible scope of post-amendment orders is urgently needed by the fresh fruit industry as a whole. Seventy-five or more complaints have been brought against industry members [R. 57, Appendix C, p. ....]. Each person subjected to the Commission's broad-guage order is faced with the awful responsibility and hazard of interpreting the statute at his peril. Yet the offense charged is not one with respect to which protection of the public dictates a broad and flexible framework within which the Commission can, upon infraction of this order, swiftly move to strike down an imminent threat

to competition, to the consumer, to the fresh fruit industry, or to any level of distribution. In response to Commissioner Elman's inquiry, "Who is hurt by this? (the purported violation of Section 2(c))" the government's response was that it did not know [R. 60, third series of pagination, lines 7-19].

Conclusion.

For the reasons stated, it is respectfully requested that this Court grant certiorari.

Respectfully submitted,

JAMES M. DALE,
Attorney for Petitioner Western Fruit Growers Sales Co.

APPENDIX "A".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Western Fruit Growers Sales Co., Petitioner, vs. Federal Trade Commission, Respondent. No. 18,344. Aug. 20, 1963.

On Petition to Review an Order of the Federal Trade Commission.

Before: Barnes, Hamlin and Duniway, Circuit Judges. Hamlin, Circuit Judge:

The Federal Trade Commission, respondent herein, issued a complaint charging Western Fruit Growers Sales Company, hereinafter petitioner, with paying, granting or allowing to certain buyers and brokers purchasing for their own account, brokerage or allowances in lieu thereof in violation of section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. § 13(c)). After a hearing, the hearing officer rendered a decision that petitioner had violated the Act. The respondent adopted the hearing officer's decision and issued a cease and desist order against petitioner. Petitioner now petitions this court for a review of the Commission's order. This court has jurisdiction to review the order under the provisions of section 11 of the Clayton Act (15 U. S. C. § 21(c)).

Petitioner, a corporation doing business in California with its principal place of business at Fullerton, California, has for several years been engaged in the business of packing, selling and distributing fruit. It acts

as a consignment shipper for some twenty-two packing houses in California and Arizona, and sells and distributes its fruit through brokers to wholesalers, jobbers and commission merchants, as well as direct to customers located in many parts of the United States.

The evidence before the Commission related to a number of transactions which were said to be representative of a much larger number of transactions in which petitioner had sold, shipped and invoiced substantial quantities of fruit to certain firms and had paid to those firms brokerage fees or commissions. Under section 2(c) of the Clayton Act,[1] a seller may not pay a buyer brokerage on the latter's purchases for his own account or for the account of another; the motive and good faith of the seller are immaterial to a violation of this section.[2] The Commission concluded on the evidence presented that petitioner had violated section 2(c).

The principal issue before the hearing officer was whether a seller-buyer relationship existed between petitioner and the recipients of the brokerage in the rep-

---

[1]Section 2(c) of the Clayton Act provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 49 Stat. 1527; 15 U.S.C. 13(c).

[2]See, *e.g.*, Modern Marketing Service, Inc. v. F.T.C., 149 F.2d 970 (7th Cir. 1945).

resentative sales transactions shown by the record.[3] If such a relationship did exist, petitioner violated section 2(c). The hearing officer's finding that such sales were made, adopted by the Commission, is conclusive "if supported by substantial evidence" (15 U. S. C. § 21(c).) in the record.[4]

We hold that the findings of the respondent are supported by substantial evidence in the record and that respondent properly issued a cease and desist order. That sales were made to the brokers in the representative transactions was evidenced by the following: the goods were invoiced directly to the brokers; counsel for petitioner at the time of the trial admitted that when the goods were shipped it was considered a completed transaction; petitioner lost control of the goods after they were shipped, *e.g.*, it did not know what the brokers' reselling prices were, the broker did not account to Western for the price the broker received upon resale of

---

[3]Petitioner contests certain findings made by the hearing officer concerning "discriminatory discounts." The Commission, however, qualified its adoption of the hearing officer's findings, by the following language: "(the Commission specifically not relying on the evidence referred to on pages 7-8 of the initial decision relating to volume discounts granted to large direct buyers by respondent.)" In its brief, the Commission states that it intended and regards the quoted language as a rejection of those findings and as having the same effect as though it had entered a formal order striking from the decision the paragraph in which they were set forth.

[4]Petitioner contends that all of the findings relate to the conduct of the brokers and not to that of petitioner. This contention is without merit. The hearing officer specifically found that all of the material allegations of the complaint had been proved, one of which was that petitioner had made sales to its "brokers and direct buyers purchasing in their own name and for their own account for resale" upon which brokerage was paid. The hearing officer also discussed specific sales made by petitioner in violation of section 2(c).

the goods, the name of the customer to whom the broker resold the goods was not known by petitioner in some instances, the broker did not bill petitioner for any loss incurred by the broker when goods were sold by him at a lower price than that invoiced to him, and once a month the broker billed petitioner for the brokerage on fruit, basing the brokerage fee on petitioner's invoice price to the broker.[5]

Petitioner contends that assuming that a cease and desist order should have been issued, the order issued by the Commission was too broad. We hold that petitioner's contention is without merit. The Commission's order provided:

> "It Is Ordered that respondent Western Fruit Growers Sales Co., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit or any other food products in commerce, as 'commerce' is defined in

[5]While these facts were generally conceded by petitioner, it contended that the fruit market was extremely competitive, that its margin of profit was low, and that it could not afford to deal directly with the buyers of small quantities of fruit; therefore, when several small customers were each to receive portions of a single carload of fruit, the broker as a matter of convenience was billed rather than the various small purchasers. As noted earlier, however, motive and intent are immaterial to a violation of section 2(c), if a sale upon which brokerage is paid has in fact been made. Mr. Frees, petitioner's general manager and the only witness to testify, did state that the transactions were not intended by the parties to be sales, but the credibility of his testimony was a matter for the determination of the hearing officer. Further, although it is not our function to weigh the evidence, it is certainly questionable whether much weight could be given Mr. Frees' statement in the light of the undisputed evidence outlined in the text above.

the Clayton Act, do forthwith cease and desist from:

> Paying, granting, or allowing directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of citrus fruits or any other food products, to such buyer for his own account."

The Supreme Court has recognized that the Commission has wide discretion to formulate a remedy adequate to prevent repetitions of a violation that has been committed.[6] An agency "is not limited to prohibiting 'the illegal practice in the precise form' existing in the past" and "may fashion its relief to restrain 'other like or related unlawful acts'."[7] Section 2(c) is narrowly drawn to condemn the practice of exchanging brokerage between buyer and seller, whether the exchange be by an open payment or disguised as a discount or allowance. We feel that the order quoted above does no more than prohibit the practices found to exist in this case and closely related acts, all of which are expressly prohibited by section 2(c). The appropriateness of an order necessarily depends upon the facts of the particular case and we merely hold here that the order quoted above

---

[6]See Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 611-612.

[7]See Federal Trade Commission v. Mandel Bros., Inc., 359 U.S. 385, 392-393 (1959).

was sufficiently tailored to the circumstances of this case to preclude its modification by this court.[8]

Petitioner's contention that the Commission cannot make its order binding upon unnamed officers, agents, representatives and employees of petitioner is similarly without merit.[9]

It is hereby ordered that the order of the Commission in this case be obeyed by petitioner.

(Endorsed) Opinion Filed Aug. 20, 1963.

Frank H. Schmid, Clerk.

---

[8]Petitioner cites Federal Trade Commission v. Broch, 368 U.S. 360 (1962) in support of its position that the order is too broad. In that case, the Court of Appeals for the Seventh Circuit had modified the Commission's order by striking out all references to "any other seller principal" and to "any other buyer," thus confining the order to future sales between the parties to the transaction which was found violative of section 2(c). The Supreme Court reversed the Court of Appeals, holding that the Commission had wide discretion to formulate a remedy adequate to prevent repetitions of the violation and could properly ban repetitions in connection with transactions involving "any" seller or buyer. With the exception that it contained the phrase "in any other manner," paragraph 2 of the Commission's order in that case contained language similar to that used in the order of the Commissioner in the present case. The Supreme Court stated the following concerning paragraph 2:

> "We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments."

The Court, though raising a question concerning the language used, did not hold it to be insufficient; nor did the Court point out in which respect the language might be considered inappropriate. It could be that the language "in any other manner," which is extremely broad, was the target of the Court's comment.

[9]See Mandel Bros., Inc. v. Federal Trade Commission, 254 F.2d 18, 22 (7th Cir. 1958), rev'd on other grounds, 359 U.S. 385 (1959).

APPENDIX "B".

Decision and Order.

United States of America Before Federal Trade Commission.

Commissioners: Paul Rand Dixon, Chairman, Sigurd Anderson, William C. Kern, Philip Elman, Everette MacIntyre.

In the Matter of Western Fruit Growers Sales Co., a corporation. Docket No. 8194.

This matter having been heard by the Commission upon the appeal of respondent from the hearing examiner's initial decision; and

It appearing to the Commission, upon review of the record, that the allegations of the complaint are substantiated by the evidence; and

It further appearing that the facts of the instant case are substantially similar to those involved in a large number of cases in which Commission orders have been issued in terms identical with those contained in the initial decision herein; and that in the interest of uniform and equitable treatment of competitors, the entry of such an order against respondent is warranted by the facts presented (the Commission specifically not relying on the evidence referred to on pages 7-8 of the initial decision relating to volume discounts granted to large direct buyers by respondent);

It Is Ordered that the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that respondent shall, within sixty (60) days after service upon it of this order, file

with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Commissioner Elman not concurring.

Joseph W. Shea,
Secretary.

Issued: September 18, 1962.

APPENDIX "C".

Initial Decision.

United States of America Before Federal Trade Commission.

In the Matter of Western Fruit Growers Sales Co., a corporation.

Loren H. Laughlin, Hearing Examiner.

Cecil G. Miles and *Basil J. Mezines*, for the Commission;

Wadsworth, Fraser & McClung, by *E. L. Fraser*, Los Angeles, California, for the Respondent.

This proceeding is brought under §2(c) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, §13). The complaint charges, in substance, that respondent, for some years past, in the course and conduct of its business of making substantial sales of citrus fruit in commerce, has paid and is paying commissions, brokerages or other compensations or allowances or discounts in lieu thereof in connection with the sale (1) to some but not all of its brokers; and (2) to direct buyers who purchase such citrus fruits in their own names and for their own accounts for resale. Respondent, in its answer, admits that in the course and conduct of its business it has been and is now making substantial sales of citrus fruit to some but not all of its brokers and direct buyers purchasing in their own names, but denies that said sales were made for the brokers' own accounts, and claims, upon information and belief, that while such purchases were in such brokers' names, they were for customers of such brokers on a pool basis. Respondent further denies, in substance, the granting or allowance of any

commissions, brokerages or other compensation to such purchasers in violation of §2(c) of the Clayton Act. In this initial decision, the charges of the complaint are found to be sustained, and a cease-and-desist order is issued.

The complaint was issued November 29, 1960, and respondent, after service, filed its answer on December 30, 1960. On April 10, 11 and 12, 1961, hearings were held in Los Angeles, California, at which both parties presented their evidence and rested except for the negotiation of a stipulation proposed by counsel supporting the complaint. Such stipulation was never agreed upon, however, and on September 19, 1961, counsel supporting the complaint filed their motion to close the record, which was duly granted by the Hearing Examiner. Pursuant to order of the Hearing Examiner, counsel supporting the complaint filed their proposed findings, conclusions and order on October 23, 1961, and those of the respondent were filed on October 30, 1961. All proposed findings of fact and conclusions of law submitted by the parties which are not incorporated herein, either verbatim or in substance and effect, are hereby rejected. The proposed order submitted by counsel supporting the complaint is herein adopted.

The Hearing Examiner has carefully and fully analyzed the whole record, taking into consideration his observation of the appearance, conduct and demeanor of the sole witness who appeared before him. All proposals and briefs of counsel have been studied in the light of the entire record. Upon the whole record the Hearing Examiner finds generally that the Commission has fully sustained the burden of proof incumbent upon it, and has established by reliable, probative and substantial evidence and the fair and reasonable inferences

to be drawn therefrom, all the material allegations of the complaint; and further finds that the evidence submitted by respondent fails to establish facts constituting any valid defense to the charges of violation contained in the complaint. More specifically, upon due consideration of the whole record, the Hearing Examiner makes the following:

FINDINGS OF FACT

Respondent Western Fruit Growers Sales Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at Fullerton, California, with mailing address as Post Office Box 171, Fullerton, California.

Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines, and grapefruit, all of which are sometimes hereinafter referred to as citrus fruit or fruit products. It also so deals in avocados. Respondent acts as a consignment shipper for some twenty-two packing houses in California and Arizona, which packing houses in turn represent hundreds of growers. Respondent sells and distributes its citrus fruit and avocados through brokers, wholesalers, jobbers and commission merchants; as well as direct to customers located in many sections of the United States. Respondent transports, or causes such products, when sold, to be transported from its place of business or packing plant in the State of California, or from other places within that state, to such buyers or to the buyers' customers located in various other states of the United States. Thus, respondent is now and for the past several years has been engaged

in commerce as "commerce" is defined in the aforesaid Clayton Act.

One of the two real issues contested in this case is whether or not respondent violated §2(c) on a number of occasions by invoicing some of the brokers with whom it dealt, instead of the customers to whom such brokers sold the citrus fruit in question. Respondent contends that it was compelled to bill such brokers directly in order to avoid prohibitive costs of invoicing and collecting from many separate customers on a multitude of small shipments. The other real issue contested herein involved the contention of respondent that volume discounts given to national chain-grocery organizations buying fifty or more cars per year were justified by cost savings.

The law is now well settled that §2(c) of the Clayton Act is an absolute prohibition of the payment of brokerage by sellers either to buyers or to buyers' representatives, agents or brokers. See *The Great Atlantic & Pacific Tea Company v. FTC* (C.C.A. 3 (1939)), 106 F.2d 667, particularly pages 674 and 678. Many scholars of antitrust laws have sharply criticized, not only the language of §2(c) as adopted by Congress, but the interpretation placed upon it both by the Courts and by the Federal Trade Commission, and it is claimed that the Commission uses §2(c) proceedings more than proceedings under other sections of the Robinson-Patman amendment to the Clayton Act, because, as a learned critic has very recently put it,

> "It is easy to understand why §2(c) is invoked. That section is a *per se* statute with a vengeance; there is no requirement of proof of any likelihood

> of injury, and there are no defenses" (Milton Handler, "Recent Antitrust Developments," Yale Law Journal, Vol. 71, pp. 75 et seq., especially p. 104).

In §2(c) litigation, however, although the statute may be a *per se* one, the facts are never self-operative and must be proved, and "the decision depends on the circumstances of each case". *FTC v. Henry Broch & Company* (1960), 363 U.S. 166, 175-176, reversing C.A. 7 (1958), 261 F.2d 725, and reinstating the Commission's decision and order against respondent (1959), 54 FTC 673. The evidence in the case at bar has therefore been given full and fair consideration, as already stated.

At the very beginning of the case respondent's counsel conceded (R. 7-8):

> "The position of Western Fruit Growers Sales in this matter, charged with the violation of §2(c), is simply this: that sales were made to brokers and discount was allowed upon the representation by the brokers that these sales were for the broker's customers and would be in turn sold on a pool basis to the broker's customers or in small lots. * * * Under the provisions of the Act, we could stipulate that the Government has a *prima facie* case and that all it needs to do is to introduce one sales jacket containing documents showing the sale to a broker and a commission deduction to that particular broker; * * *". That would be a *prima facie* case under 2(c), and the burden would shift to us to prove the fact and circumstances surrounding it, which we are entitled to do."

The case was defended on this theory. If respondent's evidence were to establish a valid defense, the burden of proof, of course, was upon respondent. *FTC v. Washington Fish & Oyster Company, Inc.* (C.A. 9, 1960), 282 F.2d 595, 597. Respondent has not sustained this burden of proof. Only one witness testified, Thomas Frees, sales manager of respondent. This company was organized on or about October 1, 1957, by a group of persons, each of whom had had considerable experience in the fruit selling and distribution business. By their enterprise and activities, including the practices complained of herein, they had established a substantial business by the time their affairs were investigated over two years later by the Federal Trade Commission. On March 8, 1960, the Commission adopted a resolution entitled "Resolution Directing Investigation of the Payment of Brokerage or Commissions or Allowances or Discounts in Lieu Thereof by Corporations Engaged in the Sale and Shipment of Fresh Citrus Fruit". Pursuant thereto, among many other citrus-fruit dealers in Florida, Texas and California, the respondent was ordered to file a special report setting forth information pertaining to its activities in the business (Commission's Exhibit 1-A). Official notice is taken that the Commission, after considerable negotiation, has entered cease-and-desist orders based upon consent agreements, which orders are identical with the one requested and entered herein, in some seventy-five or more §2(c) cases against various of such citrus-fruit dealers.

Respondent complied with the Commission's order by a special sworn report dated September 28, 1960, which, together with the annexed exhibits, was trans-

mitted to the Commission (Commission's Exhibit 1). The several sales jackets or files produced and submitted by respondent are in evidence in this proceeding as Commission's Exhibits 2-A through 20-J, and, together with the testimony of the witness Frees, constitute the entire trial record herein. It would serve no useful purpose to discuss all of these sales documents in detail. It was testified by Mr. Frees, in substance, that a substantial part of respondent's business from the time of its organization consisted of transactions with various corporations, partnerships, and individuals designated by respondent as its brokers, among which were Brown and Loe and Tom Lange, Inc., both of St. Louis, Missouri, and Russell Ward Company, Inc. of Seattle, Washington, whose dealings, it is agreed upon the record, were representative of respondent's transactions with such brokers. The record discloses that during 1959 the respondent sold, shipped and invoiced a substantial quantity of citrus fruit to Brown and Loe at St. Louis; each and all of the invoices sent to this concern by respondent indicate that a brokerage or commission was allowed. Invoices from Brown and Loe to the ultimate customers in each of these transactions were also offered in evidence to show the final distribution of the fruit, and were received with the other documents relevant to the particular several transactions. Such invoices disclosed definitely, in many instances, that Brown and Loe had invoiced their customers at prices which were either higher or lower than the price charged by the respondent to Brown and Loe before the brokerage was deducted. There are many such examples in the record, but a few will suffice to illustrate the practice. Commission's Exhibits 3-A and

3-C show that in respondent's invoice of March 12, 1959, to Brown and Loe, twenty cartons of lemons were purchased for $2.25 a carton less brokerage, which same lemons were then invoiced by Brown and Loe to a customer, Raith Brothers Company, at $2.40 per carton, a 15¢ profit. Other exhibits (Commission's Exhibits 7-A and 7-B) show that respondent, on September 17, 1958, invoiced to Brown and Loe twenty cartons of oranges at $3.00 per carton, and twenty-five cartons of another size of oranges at $2.75 per carton. These oranges were then invoiced by Brown and Loe to Raith Brothers Company at $3.25 and $3.00, respectively, a 25¢ profit per carton in each instance. In one unusual transaction (Commission's Exhibits 11-A and 11-B) it appears that Russell Ward was invoiced citrus fruit at $3.50 per carton, which it resold at $3.00 per carton, sustaining a loss of 50¢ per carton on some twenty-five cartons. It is urged by counsel supporting the complaint that this type of transactions, which are admittedly typical of many with the several brokerage firms above named, would show that these purchases were by the brokers for their own account for resale, and that they unlawfully received brokerage on these transactions from the respondent.

The respondent, while insisting that these transactions were billed to the brokers merely as a matter of convenience and were actually sales to the ultimate consumer rather than to the brokers, nevertheless admitted that insofar as the respondent was concerned, at the time it delivered the merchandise to the broker and billed him, "it was a completed transaction" (R. 10, 11, 25 through 27, 113 and 114). As already indicated, respondent has conceded that this would constitute a *prima facie* case against it. Its defense con-

sisted of an attempt to show how it could not afford to deal directly with buyers of small quantities of citrus fruit because of the additional cost of 1.4c per carton to it, which was more than double the 0.10 of one cent per carton which it claimed was the highest profit it could make on such shipments. It is claimed that respondent cannot "police" such transactions clear through to the broker's buyer. It is urged that judicial notice be taken that the citrus market is extremely competitive, and that immediate sales of fruit must be effected when the crops mature, and that, to accomplish its distribution of these products, respondent's network of some one hundred brokers must be reached by immediate communication through telephone, telegraph, or teletype, as prices fluctuate rapidly. It is further urged:

> "In the light of these circumstances and the additional costs involved in separate billing and collecting, respondent could not conduct its business in any other manner. The effect of a Commission decision against respondent most certainly would eliminate mixed load direct broker billings to the ultimate hardship of the grocers, respondent and purchasers. The Commission would not only eliminate one important channel of distribution, but favor the larger purchasers."

This claim of respondent's, in essence, was the basis for the Seventh Circuit's dismissal of the *Broch* case (261 F.2d at p. 729), but, as the Supreme Court said in *Federal Trade Commission v. Broch & Company*, *supra*, 363 U.S. at page 177, in reversing such dismissal:

> "If we held that §2(c) is not applicable here, we would disregard the history * *, overturn a settled administrative practice, and approve a construction that is hostile to the statutory scheme—one that would leave a large loophole in the Act. Any doubts as to the wisdom of the economic theory embodied in the statute are questions for Congress to resolve."

The testimony of Frees, bulwarked by after-the-fact letters of hearsay character from several brokers, indicates that it was the understanding between respondent and its several brokers that these direct broker billings were not considered sales between them, but were made in order to avoid the additional costs above referred to. It is unnecessary to determine here whether this position taken by respondent and its brokers was true or false. In *Modern Marketing Service, Inc. v. FTC*, C.C.A. 7 (1945), 149 F.2d 970, it was held that motive and good faith were immaterial to a violation of §2(c) (pages 976, 978). See also *Webb-Crawford Co. v. FTC*, C.C.A. 5 (1940), 109 F.2d 208, 209. In short, §2(c) of the Act is a *malum prohibitum* statute, the mental conditions and reasons are insufficient to avoid the statute's mandate. The law is against the practice rather than the intent, wherever brokerage is paid by a seller to a buyer or a buyer's agent, representative or broker.

While dual representation by a broker, with both the seller and the buyer, "was not prohibited by the common law if this dual status was disclosed fully" to both principals,

> "It is obvious that dual representation by agents opens a wide field for fraud and oppression * *

> We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. * * * The agent cannot serve two masters, simultaneously rendering services in an arm's-length transaction to both." *The Great Atlantic & Pacific Tea Company v. FTC, supra*, 190 F.2d at pp. 675, 676.

The evidence here clearly establishes that these brokers were in fact acting for themselves and selling to others at a profit to themselves (or, in only the one instance above referred to, at a loss). Their acts were inconsistent with the claim that they were respondent's brokers. When they collected from their buyers, they remitted, at most, only what they, the brokers, were billed for by respondent, and respondent never indicated any interest in a further accounting from such brokers, who took both a brokerage from respondent and either a brokerage or a profit in such cases from those to whom they sold. Whether they be considered as buyers selling for themselves or as brokers for their buyers, in either event the respondent has violated §2(c). "A seller may not pay the broker brokerage on the latter's purchases for his own account." *Southgate Brokerage Co. v. FTC* (C.C.A. 4, 1945), 150 F.2d 607. Nor may a broker for a retail buyer receive commissions from the seller. *FTC v. Henzel et al.* (C.C.A. 2, 1945), 150 F.2d 450, and numerous cases cited.

The evidence further discloses that respondent granted a fluctuating discount of up to 15¢ per carton to purchasers of fifty or more cars of citrus fruit per year. Such discounts were granted to National Grocers, The Great Atlantic & Pacific Tea Company, Na-

tional Tea Company, Eisner Grocery Company and Topco Associates, all of which were and are large chain supermarket concerns, who bought many carload lots between November 1, 1959, and September 30, 1960. Mr. Frees testified that this discount reflected substantial savings in communications, billing, accounting and collections, and that the average cost of a transaction was $30.00, whether the transaction involved five hundred cartons or five thousand cartons. Respondent objected to inquiry by counsel supporting the complaint on the subject of volume discounts on the ground that such matters involved a violation of §2(a) rather than §2(c), under which respondent was charged. Respondent nevertheless contends that its discounts to these large buyers were fully justified by cost savings, and further argues that this volume discount of up to 15¢ per carton had no relationship to the regular 5¢-per-carton brokerage usually allowed, concluding that such volume discounts could not be considered as granted in lieu of brokerage. Counsel supporting the complaint contend, however, that respondent's policy of granting these substantial volume discounts, in any view of the evidence, cannot be reconciled with the small 6 10-of-one-cent average profit per carton on shipments allegedly consigned to brokers, as claimed by respondent; and contend further that no inference can be drawn except that the discounts granted to these large direct buyers must have been based, in part at least, on respondent's savings in the payment of brokerage. They argue that the testimony of Frees, respondent's sales manager, that the 15¢ per-carton quantity discount to the chain groups saved respondent all major cost factors incurred in selling through brokers, and the numerous substantial

brokerage charges shown by the exhibits, prove conclusively that respondent passed on brokerage savings to such chain group buyers. We agree with counsel supporting the complaint, and it is found that, to that extent, such discounts or allowances to such chain group buyers were in lieu of brokerage and in violation of §2(c) of the Clayton Act, as alleged in the complaint.

Accordingly,

It Is Ordered that respondent Western Fruit Growers Sales Co., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit or any other food products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of citrus fruit or any other food products to such buyer for his own account.

Loren H. Laughlin,
Hearing Examiner.

December 18, 1961.